Green, LindaE

From:	James Pew <jpew@earthjustice.org>
Sent:	Thursday, February 15, 2018 10:21 AM
To:	FOIA HQ
Cc:	Sanjay Narayan; Robyn Winz
Subject:	FOIA Request
Attachments:	Sierra Club FOIA Request_02-15-2018.pdf

To whom it may concern: please accept the attached FOIA request from Sierra Club, dated February 15, 2018. If you have any questions, please contact me at the telephone number below.
James Pew

Note my new direct dial and extension number below.

James S. Pew
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EARTHJUSTICE

February 15, 2018

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667
E-mail: hq.foia@epa.gov

BY EMAIL: hq.foia@epa.gov

Re: FOIA Request Re Once-In-Always-In Policy

Via Electronic Mail

Dear National Freedom of Information Officer:

On behalf of the Sierra Club, we submit this request that the United States Environmental Protection Agency ("EPA") provide copies of the records described below pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., and the EPA regulations at 40 C.F.R. § 2.100, *et seq.*

Sierra Club requests a public interest fee waiver for this FOIA request.

Pursuant to the Freedom of Information Act, we request copies of any and all records of communications subsequent to November 7, 2016, regarding or relating to the Memorandum from John S. Seitz of May 16, 1995 ("Seitz Memo") (attached), generally to Environmental Protection Agency's "once-in-always-in" policy for air toxics regulations issued under 42 U.S.C. § 7412, to determining whether a source of hazardous air pollutants is a "major source" under § 7412(a), to the timing of any such determinations, or to the memorandum from Assistant Administrator Wehrum of January 25, 2018 ("Wehrum Memo") (attached). Please provide copies of any and all such records of communications between (A) people and organizations outside EPA, including but not limited to the following organizations and any person employed by or affiliated with them: Hunton & Williams, LLP, Plastics Industry Association, National Lime Association, Air Permitting Forum, National Environmental Development Association's Clean Air Project, Louisiana Chemical Association, American Chemistry Council, National Mining Association, Edison Electric Institute, Steel Manufacturers Association, Specialty Steel Industry of North America, American Iron and Steel Institute, American Composites Manufacturers Association, South Carolina Pulp and Paper Association, American Forest & Paper Association, Coalition for Responsible Waste Incineration, Environmental Council of the States, Association of Air Pollution Control Agencies, Arizona Department of Environmental Quality, South Dakota Department of Environment and Natural Resources, Department of Defense,

Georgia Environmental Protection Division, Georgia Department of Natural Resources, Ohio Environmental Protection Agency, Utility Air Regulatory Group, Institute of Clean Air Companies, National Mining Association, American Public Power Association; and (B) EPA staff in the Office of the Administrator (Immediate Office), Office of Congressional and Intergovernmental Relations, Office of the Executive Secretariat, Office of Policy, Office of Public Affairs, Office of Air and Radiation, and Office of General Counsel and Regional Offices, the Office of Enforcement and Compliance Assurance, as well as any members of the transition, beachhead, and landing teams in any EPA office, including but not limited to E. Scott Pruitt, William L. Wehrum, Elizabeth Shaw, Amanda M. Gunasekara, Elineth Torres, Debra Dalcher, and Panagiotis E. Tsirigotis, Daisy Letendre, Nena Shaw, Kristinn L. Sharpe, Elizabeth Corona, and Robert Sachs.

Relevant search terms include, but are not limited to, "Seitz Memorandum," Seitz Memo," "Wehrum Memorandum," "Wehrum Memo," "reclassification of major sources," "once-in-always-in," "OIAI," "maximum achievable control technology," "MACT," "major source," "area source," "synthetic area source," "minor source," "synthetic minor source," "potential to emit," and "PTE."

Please do not include any records that have already been placed in docket EPA-HQ-OA-2017-0190. It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please contact me to discuss this possibility. In addition, to the extent that records responsive to this request are available in a widely-used electronic format (*e.g.*, pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Air Act. In the event that any requested document is claimed, or continues to be claimed, exempt from disclosure or review, or otherwise withheld, we request an index or log of documents withheld, with the maximum possible identifying information that you can provide, including a description of the document withheld, its date, its location, its recipient(s) and the specific reason(s) the document is being withheld. 5 U.S.C. § 552(b).

We also request that responsive records be released as soon as they are available, on a rolling basis, but in no event later than 20 days, as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

Definitions

For the purposes of this request, the terms "record" and "records" mean all materials in whatever form (handwritten, typed, electronic or otherwise produced, reproduced, or stored) in EPA's possession as of November 7, 2016, including, but not limited to, letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, notes of telephone conversations, telefaxes, e-mails, text messages, internet

chat logs, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described above at any stage of development, whether proposed, draft, pending, interim, final, or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the EPA or any of its offices nationwide, including responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any governmental purpose.

Exempt Records

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Air Act. Should you nonetheless invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and

2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below. If the requested documents do not exist, please indicate that in your written response.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), Sierra Club requests a fee waiver because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *See* 40 C.F.R. § 2.107(l)(2). Additionally, to determine whether the request "is not primarily in the commercial interest of the requester" the government will consider two factors: 1) the existence and magnitude of a commercial interest, and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors related to the fee waiver requirements specified in EPA's FOIA regulations at 40 C.F.R. § 2.107(l)(2)–(3), weigh in favor of granting Sierra Club's

fee waiver request. Moreover, federal courts have held that FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

A. The Request is in the Public Interest.

Factor 1: The Request Seeks Information That Has a "Direct and Clear" Connection to Operations or Activities of the Federal Government.

Sierra Club's request clearly concerns the operations of the government. It seeks information regarding EPA's implementation of the Clean Air Act's requirements for the control of hazardous air pollutants. The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government.[1] There can be no question that this is such a case.

Factor 2: Disclosure of the Requested Records is "Likely to Contribute" to Public Understanding of Government Operations or Activities.

On May 16, 1995, EPA issued the Seitz Memo addressing "when a major source of hazardous air pollutants can become an area source – by obtaining federally enforceable limits on its potential to emit – rather than comply with major source requirements. Seitz Memo (attached) at 1. That memorandum articulated EPA's "once in, always in policy" "that facilities that are major sources of [hazardous air pollutants] on the 'first compliance date' are required to comply permanently with the MACT standard to ensure that maximum achievable emissions in toxic emissions are achieved and maintained." *Id.* at 9

On January 25, 2018, EPA issued the Wehrum Memo, which purports to reverse the Seitz Memo. Wehrum Memo at 1 (attached). The Wehrum Memo states "EPA has now determined that a major source which takes an enforceable limit on its [potential to emit] and takes measures to bring its [hazardous air pollutant] emissions below the applicable threshold becomes an area source, no matter when the source may choose to take measures to limit its [potential to emit]. That source, now having area source status, will not be subject thereafter to those requirements applicable to the source as a major source under [Clean Air Act] section 112, including, in particular, major source MACT standards – so long as the source's [potential to emit] remains below the applicable [hazardous air pollutant] emission thresholds."

EPA issued the Wehrum Memo without providing notice or opportunity for comment and without creating a rulemaking record that the public could review. Accordingly, there is currently little or no information publicly available regarding the details of EPA's decision to revoke the once-in-always-in policy. Thus, the records requested will contribute to the public

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[1] Available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/intro-july-19-2013.pdf.

understanding of EPA's "operations and activities" associated with this critically important information.

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of EPA's decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request.

The information that the Sierra Club seeks will significantly contribute to the public's understanding of EPA's implementation of the Clean Air Act's requirements for the control of hazardous air pollutants. This information will facilitate meaningful public participation and debate about EPA's resource allocation practices, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of the agency's decision-making process.

Factor 3: Disclosure of the Requested Records Will Contribute to "Public Understanding" of EPA's Implementation of the Clean Air Act's Requirements for Hazardous Air Pollutants.

The Sierra Club has demonstrated involvement in clean air issues for decades. The Sierra Club also unquestionably has the "specialized knowledge" and "ability and intention" to broadly disseminate the information requested in a manner that contributes to the understanding of the "public-at-large." Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club's website, emailing and list serve distribution to our members and supporters across the U.S., and via public meetings and events. Every year the Sierra Club website receives roughly 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. *Sierra Club Insider*, an electronic newsletter, is sent to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system.

Sierra Club's detailed description of its capacity and will to disseminate information gathered from the requested records demonstrates that disclosure of the records will contribute to public understanding. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (requester demonstrates likelihood of contributing to public understanding of government operations and activities where it specifies multiple channels for disseminating information and estimated viewership numbers).

Factor 4: Disclosure of the Requested Records Will Make a "Significant" Contribution to the Public's Understanding of EPA's Implementation of the Clean Air Act's Requirements for Hazardous Air Pollutants.

The fourth factor EPA considers is whether the records are "likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information . . . will enhance the public's understanding," the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

Here, the request satisfies the fourth factor. As documented above, the public has little to no knowledge of the position EPA took in the Seitz Memo or of EPA's subsequent decision to reverse that position in the Wehrum Memo. Further, the subject of the request concerns the operations and activities of the federal government, which the public has a right to know about. Transparency is crucial to the proper functioning of government, and requestors should not have to file lawsuits to motivate EPA to fulfill its obligations under FOIA. As a practical matter, the public has little or no information regarding how it is determined that a source of hazardous air pollutants either is or is not a major source that must meet MACT standards and how major sources may avoid meeting MACT standards by obtaining State limits on their emissions. This information would significantly contribute to the public's understanding of whether EPA is implementing the Clean Air Act's requirements for hazardous air pollutants in a lawful way or whether it is unlawfully allowing major sources of hazardous air pollutants to avoid compliance with MACT standards. This information would contribute significantly to the public's understanding of the origins of EPA's decision to change its position and the reasons for that decision. Further, it would contribute significantly to the public's understanding of whether EPA's new position will "ensure that maximum achievable emissions in toxic emissions are achieved and maintained," as the agency's prior position purported to do. Seitz Memo at 9.

A. <u>There is No Commercial Interest in Disclosure of the Requested Records.</u>

The Sierra Club has no commercial interest in the requested records. Nor does the Sierra Club have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. The Sierra Club is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club's mission to inform the public on matters of vital importance to the environment and public health.

* * *

We respectfully request, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). In the event that your agency denies a fee waiver, please send a written explanation for the denial. If you deny our request for a fee waiver, please provide an estimate of all charges for supplying the records I have requested in advance and allow me to respond to the estimate before proceeding with fulfilling the request.

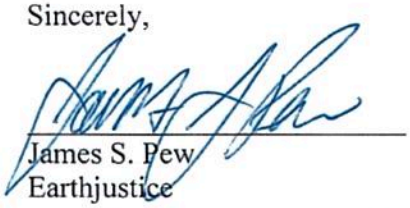
Record Delivery

We prefer to receive the records in **searchable and analyzable electronic format wherever possible**. We request that EPA comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552, *id.* § 552(a)(6)(A)(i); 40 C.F.R. § 2.104. This includes the requirement that a response to this request must be made within 20 working days of your receipt of this letter.

Please mail or email copies of all requested records as soon as possible to me at the address in my signature block below. **Please produce them on a rolling basis**; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce. If EPA concludes that any of the records requested here are publicly available, please let me know.

Thank you for your cooperation. If you find that this request is unclear in any way, please do not hesitate to contact me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply.

Sincerely,



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Submitted on behalf of:
SIERRA CLUB

Attachment 1

May 16, 1995

MEMORANDUM

SUBJECT: Potential to Emit for MACT Standards -- Guidance on Timing Issues

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Linda Murphy, Region I
Conrad Simon, Region II
Thomas Maslany, Region III
Winston Smith, Region IV
David Kee, Region V
Stanley Meiberg, Region VI
William Spratlin, Region VII
Patricia Hull, Region VIII
David Howekamp, Region IX
Jim McCormick, Region X

Section 112 of the Clean Air Act distinguishes between major sources and area sources of hazardous air pollutants. Although maximum achievable control technology (MACT) is required for all major sources of hazardous air pollutants, lesser controls or no controls may be required of area sources in a particular industry. In addition, whether a facility is a major or area source of hazardous air pollutants may affect the applicability of other CAA requirements -- such as when or whether the facility is required to obtain a Title V operating permit.

The purpose of this memo is to clarify when a major source of hazardous air pollutants can become an area source -- by obtaining federally enforceable limits on its potential to emit -- rather than comply with major source requirements. Timing questions are important to address now because several MACT standards have been promulgated and because an increasing number of sources are nearing deadlines for submitting Title V operating permit applications. The EPA recently provided guidance on how

facilities can obtain federally enforceable limits on their potential to emit hazardous and criteria air pollutants in a January 25, 1995, memo from me to you.

STATUTORY AND REGULATORY BACKGROUND

Section 112 of the Act defines a "major source" as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants..." The term "potential to emit" is defined in the section 112 general provisions (40 CFR Part 63.2) as " the maximum capacity of a stationary source to emit a pollutant under its physical or operational design," considering controls and limitations that are federally enforceable. This definition is consistent with definitions in regulations for the new source review and Title V permit programs.

SCOPE OF TODAY'S GUIDANCE

EPA has received a number of requests for clarification concerning when facilities may limit their potential to emit to avoid applicability of major source requirements of promulgated MACT standards. Most of these issues are not explicitly addressed by the section 112 general provisions nor by MACT standards themselves. Therefore, EPA is providing this guidance for MACT standards based on the Agency's interpretation of the relevant statutory language.

Today's guidance addresses three issues:

- By what date must a facility limit its potential to emit if it wishes to avoid major source requirements of a MACT standard?

- Is a facility that is required to comply with a MACT standard permanently subject to that standard?

- In the case of facilities with two or more sources in different source categories: If such a facility is a major source for purposes of one MACT standard, is the facility necessarily a major source for purposes of subsequently promulgated MACT standards?

EPA plans to follow this guidance memorandum with rulemaking actions to address these issues. The Agency intends to include provisions on potential to emit timing <u>in future MACT</u> rules and amendments to the section 112 general provisions. The EPA believes that the structure of section 112 strongly suggests certain outer limits for when a source may avoid a standard through a limit on its potential to emit. However, EPA also

believes the statute may be flexible enough to allow the Agency

to reach different results through rulemaking. In forthcoming rulemaking, EPA will be considering alternative approaches that could garner additional environmental benefits and provide additional flexibility to small sources.

TIMING FOR OBTAINING POTENTIAL TO EMIT RESTRICTIONS: GUIDANCE FOR PROMULGATED STANDARDS

Existing sources

Today's guidance clarifies that facilities may switch to area source status at any time until the "first compliance date" of the standard. The "first compliance date" is defined as the first date a source must comply with an emission limitation or other substantive regulatory requirement (i.e., leak detection and repair programs, work practice measures, housekeeping measures, etc..., but not a notice requirement) in the applicable MACT standard. By that date, to avoid being in violation, a major source must either comply with the standard, or obtain and comply with federally enforceable limits ensuring that actual and potential emissions are below major source thresholds.

The Act does not directly address a deadline for a source to avoid requirements applicable to major sources through a reduction of potential to emit. However, a result that is consistent with the language and structure of the Act is that sources should not be allowed to avoid compliance with a standard after the compliance date, even through a reduction in potential to emit. In the absence of a rulemaking record supporting a different result, EPA believes that once a source is required to install controls or take other measures to comply with a MACT standard, it should not be able to substitute different controls or measures that happen to bring the source below major source levels.

Moreover, while some standards have multiple, staggered compliance dates, these requirements are intended to function in an integrated manner to meet the statutory goals for that source category. For such a standard, the relevant date for purposes of this policy is the first substantive compliance date. While the Act may permit exceptions to these general rules, any such exceptions will need to be developed through rulemaking.

Some have read the Act to require an even earlier deadline, namely, the date of standard promulgation. EPA believes this result is not as strongly compelled by the statute. It is reasonable to presume that Congress intended a source to have some opportunity to avoid a standard by becoming an area source once it has been identified as subject in a promulgated standard.

The compliance date deadline approach would give small emitters (i.e. facilities with actual emissions below the major threshold) time to limit their potential emissions rather than comply with major source requirements. Under this approach, a facility will have the same amount of time to comply whether it chooses to meet the standard or limit its potential to emit.

This compliance date approach for existing sources is also reasonable because it recognizes the circumstances that exist regarding MACT standards issued to date. States are in the process of developing additional mechanisms that can provide federally enforceable limits to sources. In addition, EPA rules have not previously specified when facilities may switch from major to area-source status to avoid MACT applicability. It would be inequitable to hold sources to a promulgation date deadline absent clear advance notice to sources of the full significance of that date. Although the Act gives EPA discretion to designate a deadline earlier than the first compliance date, this is most appropriately done through rulemaking in a manner that gives adequate notice to the regulated community. By contrast, any source should presume that the compliance date is the final date to establish its status as an area source, at least for purposes of that standard.

For clarity, the Agency wishes to note that as long as a facility does not qualify for treatment as an area source, the facility must comply with any applicable major source requirement under the Clean Air Act. Facilities in need to comply with additional limits to qualify as area sources will need to plan ahead to obtain the limits before compliance deadlines for major source requirements. Facilities should consult with State and local air agencies concerning the timing of any necessary submittal.

New sources

Section 112 requires new sources to comply with a MACT standard upon startup or no later than the promulgation date of the standard, whichever is later. As a legal matter, to avoid being in violation, a "potential" major source must either comply with MACT or obtain and comply with federally enforceable limits by this statutory deadline.

Therefore, the Agency advises that any new facility that would be a major source in the absence of federally enforceable limits must obtain and comply with such limits no later than the promulgation date of the standard or the date of startup of the source, whichever is later. For the same reasons articulated below with regard to existing sources, a new source that is major

at the time of promulgation or startup will remain major for purposes of that standard.

Once In, Always In Interpretation

EPA is today clarifying that facilities that are major sources for HAPs on the "first compliance date" are required to comply permanently with the MACT standard to ensure that maximum achievable reductions in toxic emissions are achieved and maintained.

EPA believes that this once in, always in policy follows most naturally from the language and structure of the statute. In many cases, application of MACT will reduce a major emitter's emissions to levels substantially below the major thresholds. Without a once in, always in policy, these facilities could "backslide" from MACT control levels by obtaining potential-to-emit limits, escaping applicability of the MACT standard, and increasing emissions to the major-source threshold (10/25 tons per year). Thus, the maximum achievable emissions reductions that Congress mandated for major sources would not be achieved. A once in, always in policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.

> Example: A facility has potential emissions of 100 tons/year. After compliance with the applicable MACT standard, which requires a 99 percent emissions reduction, the facility's total potential emissions would be 1 ton/year. Under today's guidance, that facility could not subsequently operate with emissions exceeding the maximum achievable control technology emission level. The facility could not escape continued applicability of the MACT standard by obtaining "area source" status through limitations on emissions up to the 10/25 ton per year major source thresholds.

Additionally, the Act requires all major sources to obtain a Part 70 operating permit. Section 501(2) provides that any source that is major under section 112 will also be major under title V. It follows that a source that is major for purposes of any MACT standard will be subject to title V as a major source. As clarification, most MACT standards explicitly require operating permits for major sources. However, this principle applies regardless of whether it is specified in the particular standard. Therefore, a source required to comply with MACT requirements applicable to major sources will also be required to obtain a Part 70 permit for that MACT requirement.

APPLICABILITY OF MULTIPLE MACT STANDARDS TO A SINGLE FACILITY

A facility that is subject to a MACT standard is not

necessarily a major source for future MACT standards. For example, if after compliance with a MACT standard, a source's potential to emit is less than the 10/25 tons per year applicability level, the EPA will consider the facility an area source for purposes of a subsequent standard.

> EXAMPLE: A facility has degreasing operations which emit 30 tons per year of HAP. The same facility also has the potential to emit 5 tons/year of HAP from the coating of miscellaneous metal parts. After complying with the Halogenated Solvent Cleaning MACT, the maximum potential emissions from degreasing operations is 3 tons per year. The total federally enforceable potential emissions from this facility would now be 8 tons per year which meets the definition for an "area source." Therefore, this facility would not be subject to the major source requirements of the future miscellaneous metal parts MACT standard.

It should be noted that EPA has authority to require additional reductions in toxic emissions from sources that avoid MACT requirements through reductions in potential to emit. Section 112(f), the residual risk program, requires EPA to evaluate the risk and to promulgate additional standards for each category or subcategory of major sources, and allows EPA discretion to do the same for area sources, where there is not an ample margin of safety to protect public health within 8 years after promulgation of the MACT standard. The EPA will consider whether residual risk standards are appropriate for sources complying with MACT standards or potential to emit limits.

In addition, EPA is committed to implementation of the urban area source program as required in Section 112(c)(3) of the CAA. This program requires EPA to issue air toxics standards for area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas. Together, the Residual Risk Standards and the Urban Area Source Standards ensure protection of public health beyond that achieved by implementation of the MACT standards for major sources.

Attachment 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

FROM: William L. Wehrum
Assistant Administrator

1-25-18

TO: Regional Air Division Directors

This guidance memorandum addresses the question of when a major source subject to a maximum achievable control technology (MACT) standard under section 112 of the Clean Air Act (CAA) may be reclassified as an area source, and thereby avoid being subject thereafter to major source MACT and other requirements applicable to major sources under CAA section 112. As is explained below, the plain language of the definitions of "major source" in CAA section 112(a)(1) and of "area source" in CAA section 112(a)(2) compels the conclusion that a major source becomes an area source at such time that the source takes an enforceable limit on its potential to emit (PTE) hazardous air pollutants (HAP) below the major source thresholds (*i.e.*, 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAP). In such circumstances, a source that was previously classified as major, and which so limits its PTE, will no longer be subject either to the major source MACT or other major source requirements that were applicable to it as a major source under CAA section 112.

A prior EPA guidance memorandum had taken a different position. *See* "Potential to Emit for MACT Standards – Guidance on Timing Issues." John Seitz, Director, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (May 16, 1995) (the "May 1995 Seitz Memorandum"). The May 1995 Seitz Memorandum set forth a policy, commonly known as "once in, always in" (the "OIAI policy"), under which "facilities may switch to area source status at any time until the 'first compliance date' of the standard," with "first compliance date" being defined to mean the "first date a source must comply with an emission limitation or other substantive regulatory requirement." May 1995 Seitz Memorandum at 5. Thereafter, under the OIAI policy, "facilities that are major sources for HAP on the 'first compliance date' are required to comply permanently with the MACT standard." *Id.* at 9.

The guidance presented here supersedes that which was contained in the May 1995 Seitz Memorandum. The OIAI policy stated in the May 1995 Seitz Memorandum is withdrawn, effective immediately.

EPA anticipates that it will soon publish a *Federal Register* notice to take comment on adding regulatory text that will reflect EPA's plain language reading of the statute as discussed in this memorandum.

BACKGROUND

Relevant Statutory Provisions

Section 112 of the CAA establishes a multi-level regulatory structure for stationary sources of HAP, in which sources meeting a threshold amount of actual or potential HAP emissions – *i.e.*, "major sources" – are generally subject to different standards than sources with HAP emissions below the threshold.[1] Specifically, the CAA defines a "major source" to mean "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1). The term "area source" is defined to mean "any stationary source of hazardous air pollutants that is not a major source." *Id.* 42 U.S.C. § 7412(a)(2).[2] In contrast to the OIAI policy, the CAA contains no provision which specifies that, if a major source wishes to switch to area source status, by taking an enforceable limit on its PTE, it must do so prior to the "first compliance date," or that a major source MACT standard will continue to apply to a former major source that, subsequent to the first compliance date, takes an enforceable limit on its PTE to below the applicable thresholds.

EPA's Past Actions

Shortly after EPA began implementing individual MACT standards through rulemaking, the agency received multiple requests to clarify when a major source of HAP could avoid the requirements applicable to major sources by taking measures to limit its PTE below the major source thresholds. In response, EPA produced the May 1995 Seitz Memorandum. At that time, EPA took the position that facilities that are major sources of HAP on the first substantive compliance date of an applicable major source MACT standard must comply "permanently" with that standard, even if the source was subsequently to become an area source by limiting its PTE. The expressed basis for this OIAI policy was that this would help ensure that required reductions in HAP emissions were maintained over time. *See* May 1995 Seitz Memorandum at 9 ("A once in,

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[1] Standards for major sources are based on MACT, which is the level of control achieved by the best controlled sources in the category. *See* 42 U.S.C. § 7412 (d)(2), (d)(3). Standards for area sources may be based on MACT, but alternatively may be based on either generally available control technology (GACT) or generally available management practices that reduce HAP emissions. *Id.* 42 U.S.C. §7412(d)(2), (5).

[2] The CAA section 112 implementing regulations define "major source" and "area source" in nearly identical terms. *See* 40 CFR 63.2. ("Major source means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence."; "Area source means any stationary source of hazardous air pollutants that is not a major source as defined in this part.")

always in policy ensures that the health and environmental protection provided by MACT standards is not undermined.").

Since issuing the OIAI policy, EPA has twice proposed regulatory amendments that would have altered this interpretation. In 2003, EPA proposed amendments that focused on HAP emissions reductions resulting from pollution prevention (P2) activities. Apart from certain provisions associated with EPA's National Environmental Performance Track Program, that proposal was never finalized. *See* 68 FR 26249 (May 15, 2003); 69 FR 21737 (April 22, 2004).

In 2007, EPA issued a proposed rule to replace the OIAI policy set forth in the May 1995 Seitz Memorandum. 72 FR 69 (January 3, 2007). In that proposal, EPA reviewed the provisions in CAA section 112 relevant to the OIAI interpretation, applicable regulatory language, stakeholder concerns and potential implications. *Id.* at 71-74. Based on that review, EPA proposed that a major source that is subject to a major source MACT standard would no longer be subject to that standard, if the source were to become an area source through an enforceable limitation on its PTE. Under the proposal, major sources could take such limits on its PTE and obtain "area source" status at any time and would not be required to have done so before the "first compliance date," as the OIAI policy provided. *Id.* at 70 ("The regulatory amendments proposed today, if finalized, would replace the 1995 OIAI policy and allow a major source of HAP emissions to become an area source at any time by limiting its PTE for HAP before the major source thresholds."). EPA has never taken final action on this 2007 proposal, which has not been withdrawn.

DISCUSSION

EPA has determined that the OIAI policy articulated in the May 1995 Seitz Memorandum is contrary to the plain language of the CAA, and, therefore, must be withdrawn. Congress expressly defined the terms "major source" and "area source" in CAA section 112(a), in unambiguous language. A "major source" is a source that "emits or has the potential to emit considering controls, in the aggregate," 10 tpy or more of any single HAP or 25 tpy or more of any combination of HAP. An "area source" is defined simply to mean any stationary source that is not a "major source." The OIAI policy had envisioned a source whose PTE is *below* 10 tpy of any single HAP and 25 tpy of any combination of HAP (*i.e.*, an "area source"), but which is nevertheless subject to the requirements applicable to major sources, including major source MACT standards. Notably absent from the statutory definitions is any reference to the compliance date of a MACT standard. Furthermore, the phrase "considering controls" within the definition of "major source" indicates that measures a source adopts to lower its PTE below the major source threshold must be considered as operating to remove it from the major source category regardless of the time at which those controls are adopted.

In short, Congress placed no temporal limitations on the determination of whether a source emits or has the PTE HAP in sufficient quantity to qualify as a major source. To the extent the OIAI policy imposed such a temporal limitation (*i.e.*, before the "first compliance date"), EPA had no authority to do so under the plain language of the statute.[3]

[3] Noteworthy too is the fact that EPA, in promulgating the regulatory definitions of "major source" and "area source" contained in the General Provisions of 40 CFR part 63, copied the statutory language almost verbatim. *See*

Accordingly, EPA has now determined that a major source which takes an enforceable limit on its PTE and takes measures to bring its HAP emissions below the applicable threshold becomes an area source, no matter when the source may choose to take measures to limit its PTE. That source, now having area source status, will not be subject thereafter to those requirements applicable to the source as a major source under CAA section 112, including, in particular, major source MACT standards – so long as the source's PTE remains below the applicable HAP emission thresholds.

Nothing in the structure of the CAA counsels against the plain language reading of the statute to allow major sources to become area sources after an applicable compliance date, just as they have long been able to become area sources before the applicable compliance date. Congress defined major and area sources differently and established different requirements for such sources. The OIAI policy, by contrast, created an artificial time limit that does not exist on the face of the statute by including a temporal limitation on when a major source can become an area source by limiting its PTE.

Many commenters on EPA's 2007 proposal had expressed the view that, by imposing that artificial time limit, the OIAI policy created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions. To the extent that the OIAI policy has long discouraged facilities from identifying and undertaking such HAP emission reduction projects, by applying the statute as written as EPA is now doing, many types of sources will be afforded meaningful incentives to undertake such projects.

The Regional offices should send this memorandum to states within their jurisdiction. Questions concerning specific issues and sources should be directed to the appropriate Regional office. Regional office staff should coordinate with Ms. Elineth Torres or Ms. Debra Dalcher, Policy and Strategies Group, Sector Policies and Programs Division (D205-02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541-4347 or (919) 541-2443, respectively; and email address: torres.elineth@epa.gov or dalcher.debra@epa.gov, respectively.

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note 2, *supra*. EPA did not at that time include any language in those definitions that could reasonably be construed to provide support for the OIAI policy. Accordingly, the policy is contrary not only to the plain language of the CAA (which in itself is dispositive of the policy's lawfulness), but to the plain language of EPA's own regulations.